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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

NO. ~~77-1023~~

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A.C.PACEE,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT  
OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, A.C. Pacee,  
respectfully prays that a writ of certiorari issue  
to review the judgment and opinion of the United  
States Court of Appeals for the Ninth Circuit  
entered on November 8, 1977.

OPINION BELOW

The opinion and judgment of the United

Court of Appeals for the Ninth Circuit is contained in an opinion entered on November 8, 1977. A copy of said opinion is attached as Appendix A. The order of that court denying a petition for rehearing and rejecting the suggestion for a rehearing en banc, entered on December 23, 1977, is attached as Appendix B.

#### JURISDICTION

On November 8, 1977, the United States Court of Appeals for the Ninth Circuit entered a judgment affirming petitioner's conviction for violating Title 21, United States Code, Section 841 (a) (1). Petition for rehearing and suggestion for rehearing en banc was filed with the Court on November 22, 1977 and denied on December 23, 1977.

The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254 (1).

#### QUESTION PRESENTED FOR REVIEW

1. Whether Customs Inspectors, in detaining the petitioner at the Port of Entry longer than was necessary to determine if he was carrying

contraband so that surveillance could be placed on him after he entered the United States, exceeded the authority of Title 19, United States Code, Section 482, and thus unlawfully detained the Petitioner at the Port of Entry.

#### CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV: "The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation; and particularly describing the place to be searched, and the persons or things to be seized." United States Constitution, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FEDERAL STATUTE INVOLVED

Title 19, United States Code, Section 482, "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is sub-

ject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial".

STATEMENT OF THE CASE

On September 22, 1975, the Federal Grand Jury for the Southern District of California, returned a one count indictment (Criminal No. 76-0807) charging A.C. Pace with a violation of Title 21, United States Code, Section 841 (a) (1), possession of a controlled substance (129.5 grams of heroin) with intent to distribute.

On October 26, 1976, appellant's motions to suppress was heard before the Honorable William B. Enright. On October 27, 1976, the motion to suppress was denied.

On March 31, 1977, a jury trial commenced. On April 1, 1977, the Petitioner was found guilty as charged.

On April 1, 1977, the Honorable Leland C. Nielsen ordered the Petitioner remanded to the custody of the Attorney General or his authorized representative to await sentencing.

On April 25, 1977, Pacee was sentenced to a period of imprisonment for five years.

(C.R. 32). It was further ordered that in addition to such terms of imprisonment, defendant was required to serve a special parole term of ten (10) years, as prescribed by Title 21, United States Code, Section 841  
(a) (1) (a).

#### STATEMENT OF RELEVANT FACTS

On September 1, 1976, at approximately 7:p.m., Petitioner, driving a 1975 Monte Carlo, was stopped while entering the United States at the Port of Entry, Calexico, California and was directed to the secondary inspection area. Petitioner's person and vehicle were searched and no contraband was produced.

Because of the Petitioner's apparent

nervousness and the presence of two thousand dollars on his person, Customs Inspectors decided to keep the Petitioner under surveillance. The Petitioner was detained at the secondary inspection area with questions until surveillance by Custom Patrol Officers could be placed on him. At approximately 7:30 P.M., after the patrol officers were in place, the Petitioner was released. Customs Inspectors retained possession of Petitioner's driver's license until the partol officers were positioned to maintain surveillance on the Petitioner and was then told he could leave.

The patrol officers kept Petitioner under surveillance for the next two days. During that time the Petitioner made several circuitous trips through the town of Calexico, passed through the Port of Entry four more times on trips between Calexico and Mexico and met with several people as well as taking a motel room in Calexico. A few hours after Petitioner's last trip into Mexico he was stopped by Custom Patrol Officers and Drug Engorcement

Administration Agents and a search of his vehicle revealed heroin in the trunk.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals in its opinion affirming the conviction of the Petitioner has decided a federal question in a way in conflict with applicable decisions of this court. Furthermore, the Ninth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

Title 19, United States Code, Section 482 authorizes that search of vehicles and persons entering the United States. But the Ninth Circuit has ratified an expansion of that authority without regard to statutory authority or applicable decisions of this court. The court of appeals held that the Petitioner's detention at the Port of Entry, Calexico, California, was within the statutory authority of the customs officers in that it was not excessive. (See Appendix "A")

Petitioner respectfully submits that the Court of Appeals, through its analysis of the facts of this case, has eroded the protections of the Fourth Amendment and thus coming into conflict with such decisions as Terry v. Ohio, (1968) 392 U.S. 1 and Katz v. United States, (1967) 389 U.S. 347.

Petitioner recognizes that the government is given more leeway at an international border, but the authority of 19 U.S.C., Sec. 482 is still limited by constitutional safeguards of the Fourth Amendment. Implicit in 19 U.S.C., Sec. 482, as limited by the Fourth Amendment, is that an individual can be detained at an international border only for that length of time which is necessary to determine if any contraband is being smuggled into the United States. Explicitly, 19 U.S.C., Sec. 482 states that a person may be stopped and searched if the customs officers suspect merchandise is being introduced into the United States contrary to law. No

where does the statute state an individual may be detained longer than is necessary to determine the presence of contraband, and solely for the purpose of allowing surveillance to be set up on the suspect.

The facts clearly indicate the appellant was intentionally held at the border until surveillance by customs patrol officers could be established. The Ninth Circuit Court of Appeals, in its written opinion, states that, "The customs officers detained the appellant with questions until the patrol officers could be notified. After the patrol officers were in position the appellant was released."

See Appendix A. The court of appeals downplays the additional ten minute detention of the Petitioner. By detaining the Petitioner only ten minutes longer than was necessary to carry out their statutory duty, the customs officers intruded upon the Petitioner's Fourth Amendment guarantees. 19 U.S.C., Sec. 482 is not a general

police statute which allows customs officers to stop and detain individuals at will. The statute is very specific as to what the customs officers may do, and the customs officers authority to detain the Petitioner terminated when no contraband was found on his person or in his vehicle.

#### CONCLUSION

This court, as far back as 1891, has held that every person has the right to the control and possession of his or her own person unless by clear and unquestionable authority of law. Union Pacific Railroad v. Botsford, 141 U.S. 250, 251 (1891). Petitioner submits that this court should grant this writ because the authority of the customs officers in this case to detain the Petitioner in the manner they did is clearly questionable. This federal question has yet to be addressed by this court and because of the large number of daily border crossings into this country there may be the possibility of wholesale

violations of the Fourth Amendment.

This court should review this situation to determine if 19 U.S.C., Sec. 482 is being inappropriately applied by the government.

Also, this court should grant this petition because the court of appeals, by upholding the conduct of the customs officers, has decided this question contrary to prior decisions of this court, and this issue should now be settled by this court.

It is respectfully submitted that the issue herein presents a substantial question arising under the Fourth Amendment and that a writ of certiorari should issue to review the opinion of the lower court.

DATED: January 10, 1978

Respectfully submitted,

By K. J. McInerney  
Kevin J. McInerney

APPENDIX "A"

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee, ) NO. 77-2284  
          )  
          )  
          )  
          )  
v.       )  
          )  
A.C. PACEE, )  
          )  
          )  
Appellant.) OPINION

Appeal from the United States District Court  
for the Southern District of California

Before: BROWNING, GOODWIN, and KENNEDY,  
Circuit Judges.

PER CURIAM:

A.C. Pacee appeals his conviction of possession with an intent to distribute approximately 129 grams of heroin, in violation of 21 U.S.C. 841 (a) (1). The only question is whether the evidence against appellant was obtained as a result of an illegal border detention. We

hold that it was not, and affirm.

On September 11, 1976, at approximately 7:00p.m., the appellant was stopped while entering the United States at the Calexico, California, Port of Entry, and directed to the secondary inspection area. Appellant's person and vehicle were searched. Neither search produced any contraband. But, due to the appellant's nervousness and a large amount of cash discovered on his person, the customs officers decided to keep the appellant under surveillance. The customs officers detained the appellant with questions until the patrol officers could be notified. After the patrol officers were in position the appellant was released. He left the Port of Entry at approximately 7:30 p.m.

The patrol officers kept appellant under surveillance for the next two days. During this time, appellant made several circuitous trips through the Port of Entry each time. He took a motel room in Calexico, met several people,

and made several telephone calls. Approximately two and a half hours after appellant's last trip to Mexico, the patrol officers approached appellant and, with his permission, searched his car.

Heroin was found in the trunk.

Appellant contends that his detention at the Port of Entry in Calexico was unlawful because it took longer than the time necessary to conduct a search. Whether or not the officers had the right to "stall" until the surveillance was in effect, the delay produced no evidence used against Pacee.

Two statutes provide authority for customs officials to stop and search a person or vehicle entering this country. Under 19 U.S.C. 482, a customs officer may stop, search, and examine any vehicle or person he suspects of carrying merchandise subject to duty or introduced into the United States contrary to law. No probable cause is required. Alexander v. United States, 362 F.2d 379 (9th Cir.), cert. denied, 385 U.S.

977 (1966). Under 19 U.S.C. 1582, a customs officer has the authority to detain and search any person coming into the United States from a foreign country. All that is necessary is a reasonable suspicion that the entrant is engaged in activity which violates the customs laws. United States v. Chavarria, 493 F.2d 935 (5th Cir. 1974).

Appellant, recognizing the customs officers' right to stop and search him, does not contest his original detention and search. He complains only of the additional ten minute detention after this search produced no contraband. The record indicates that the appellant was still being questioned during this latter period and was not being detained solely to allow a surveillance to be set up. Certainly, given appellant's nervous actions and the large amount of cash, there was a reasonable suspicion which justified additional questioning. We do not believe the detention period was excessive; it lasted only thirty minutes in its entirety. The customs

officers violated no law in allowing a reasonable time to elapse.

Furthermore, even if we assume that appellant was unlawfully detained at the border, the heroin was properly admitted into evidence. In order to suppress the evidence, appellant must show that his detention "tended significantly" to direct the secondary investigation directly toward the evidence in question." United States v. Brandon, 467 F.2d 1008, 1010 (9th Cir. 1972). See United States v. Bacall, 443 F.2d 1050, 1055-57 (9th Cir.), cert. denied, 404 U.S. 1004 (1971). If the government shows that the evidence is a product of sufficiently independent sources, it need not be suppressed. Wong Sun v. United States, 371 U.S. 471, 487-488 (1963). United States v. Bacall, 443 F.2d at 1056.

Appellant has not shown that his original detention at the Port of Entry was significant in leading to the stop and consensual search of his car two days later. Since the customs officers

had a description of appellant and his car, he could have been placed under surveillance at any time. Appellant's constant activity in Calexico, and his passage through the Port of Entry four times during the two days, gave the customs officers a multitude of opportunities to observe him. In all probability, even without the ten minutes of extra detention, the search of appellant's car would still have occurred.

The district court properly denied the motion to suppress the evidence. The district court's judgment is

Affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, )  
                                )  
                                Appellee, )     NO. 77-2284  
                                )  
                                )  
                                )  
                                )  
                                v.        )  
                                )  
                                )  
A.C. PACEE,                )  
                                )  
                                Appellant.)     ORDER

Appeal from the United States District  
Court for the Southern District of  
California

Before: BROWNING, GOODWIN, and KENNEDY, Circuit  
Judges.

The panel as constituted in the above case  
has voted to deny the petition for rehearing and  
to reject the suggestion for a rehearing en banc.

The full court has been advised of the sug-  
gestion for en banc rehearing, and no judge of

the court has requested a vote on the suggestion  
for rehearing en banc. Fed. R. App. 35 (b).

The petition for rehearing is denied, and the  
suggestion for a rehearing en banc is rejected.